APPENDIX

APPENDIX A

IN THE
COURT OF APPEALS OF MARYLAND

Miscellaneous Docket No. 123 (Criminal)

September Term, 1973

(No. 555, September Term, 1972
Court of Special Appeals)

BRUCE CHARLES BURGER

v.

STATE OF MARYLAND

Order

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case. it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: July 3, 1973.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 555

September Term, 1972

Gilbert
Menchine
Scanlan,
JJ.

Per Curiam

Filed: April 16, 1973

The appellant, Bruce Charles Burger, was convicted by a jury in the Circuit Court for Montgomery of violating Md. Ann. Code art. 27, § 286(a)(1) (Sale of Lysergic Acid Diethylamide — LSD), and Md. Ann. Code art. 27, § 287(a) (Possession of Hashish). As a result of the convictions, Judge James H. Pugh sentenced the appellant to concurrent terms of 2-1/2 years and 6 months, respectively.

Appellant vigorously assails the judgments of conviction. He asserts:

"1. The jury could not be reasonably expected to 'disregard' the 6,000 LSD tablets placed before them which had been introduced into evidence and had played a central part in appellant's trial, and appellant's request for a mistrial should have been granted.

2. The admission of the small quantity of hashish and marijuana, which was not in the exclusive possession of the appellant, but which was found in 2 or 3 rooms of an apartment shared by appellant and 2 other persons, was reversible error.

3. It was reversible error not to allow appellant's counsel to ask certain key *voir dire* questions to the jury.

4. The trial judge, who could not hear the jury's verdict, improperly interferred (sic) with and changed said verdict at the suggestion of the State's Attorney.

5. The prosecution, as a matter of law, failed to meet its burden of showing that the appellant was sane at the time of the alleged offense."

The 6th contention of the appellant is that the "cumulative effect" of the first 5 arguments "warrants a new trial."

There is no dispue over the factual situation out of which the charges arose and no useful purpose will be served by setting them forth in full. We shall refer only to such facts as may be necessary to clarify our discussion on a particular issue.

I

The appellant was indicted in a 7 count indictment for: (1) delivering and distributing LSD, (2) possession with intent to distribute LSD, (3) possession of LSD, (4) possession of hashish, (5) possession with intent to distribute hashish, (6) conspiring to deliver Mecaline and LSD, and (7) maintaining a common nuisance.

The testimony revealed that the appellant made two sales of LSD to an undercover police office of the Metropolitan Police Department, Washington, D.C. One was a sale of 1,000 LSD tablets [1] occurring in Montgomery County, Maryland. The other sale took place in the District of Columbia and is not involved in this case. After the sales had been consummated, a search and seizure warrant was obtained

[1] The apparent agreement between the appellant and the undercover officer was that appellant would sell to the officer 1,000 LSD tablets for the sum of $300.00. After the sale, the tablets were counted by a police officer and did in fact number 1,003. The chemist who testified placed the number at 1,022. He stated, however, that he counted by weight and that this method was less accurate as it included the dust that was in the plastic bag which contained the tablets.

by the Montgomery County Police Department and it was executed in a timely fashion. No contention is made that there was not probable cause for the issuance of the warrant. No LSD was found in the apartment occupied by the appellant and two other males, although LSD in substantial quantity was found near a stairway leading from a rear porch to the back yard.

The packages of LSD tablets were admitted, over objection, into evidence by the trial judge. Later, however, Judge Pugh struck the evidence and told the jury:

> "Ladies and gentlemen of the jury, the evidence that has been stricken you will disregard that as evidence in this case as being in the possession of the defendant. The Court has ruled that wasn't in the exclusive possession of the defendant and if it wasn't in the exclusive possession it couldn't be in his possession for purposes of a count in the indictment, so it will be removed from the case and you will disregard that evidence."

When court reconvened following a recess, the appellant's counsel made a motion to strike the four exhibits which pertained to the LSD, which the court granted. The State resumed its case which continued through to the morning of the next day. At the conclusion of the State's case, a judgment of acquittal was entered on counts 2, 3, 5 and 6. The appellant then called his only witness, Dr. Bernard W. Bernard W. Murphy, a psychiatric specialist.

When examination of Dr. Murphy had been completed by both the appellant and the State, the court recessed. When the court reconvened, counsel for the appellant moved for a mistrial on the ground that "error was committed when the parcel [containing the LSD] that was found by the steps was originally admitted into evidence, and it is quite possible, Your Honor, that you could hold; (sic) I should have moved for a mistrial at that time when Your Honor decided to exclude [the evidence] . . . and it had been before the jury for quite some time, and a large quan-

tum of objective evidence had been given with respect to that particular parcel."

The answer to appellant's contention is two-fold; firstly, the decision of whether or not to grant a mistrial rests within the sound discretion of the trial judge, which discretion will only be disturbed on appeal when there is a clear showing of abuse. *Collins* v. *State,* 14 Md. App. 674 (1972); *Gerstein* v. *State,* 10 Md. App. 322 (1970); *Parker* v. *State,* 7 Md. App. 167 (1969); *Baldwin* v. *State,* 5 Md. App. 22 (1968). In *Baldwin,* we said, at 28:

> "A mistrial should be granted only where plain and obvious reasons exist, upon the greatest caution, and under urgent circumstances. Where, in the exercise of this discretion, the trial court refuses to grant a mistrial, such a decision will not be disturbed on appeal without giving full regard to the fact 'that the trial court is in an advantageous position to judge the question of prejudice, and its decision with reference thereto should not be reversed unless it is clear that there was prejudice.' *Carroll* v. *State,* 3 Md. 50, 53, 237 A.2d 535, 538 (1968) quoting *Cook* v. *State,* 225 Md. 603, 610, 171 A.2d 460, 463, cert. den. 368 U.S. 970, 82 S.Ct. 445, 7 L.Ed.2d 398 (1961)."

In the instant case, Judge Pugh struck the evidence and admonished the jury that it was to disregard the same. Under the circumstances of this case no further action was required.

Secondly, no motion for a mistrial was made until a point much later in time, *i.e.,* on the next day and only then at the conclusion of all the evidence. Even if we were to assume that grounds for a mistrial did exist (which assumption we do not make), the motion came too late. It is waived. An accused may not, if he perceives error necessitating a mistrial, sit back and wait until he sees how the entire trial is going, and, if he evaluates his chances of acquittal to be unfavorable, then and only then assert his alleged earlier claim for a mistrial.

II

The three room apartment in which the appellant resided was shared by two other occupants. The record reveals that in the "front bedroom" was found hashish, a form of marijuana,[2] and a "marijuana roach." Additionally, a jacket containing a letter addressed to appellant was strewn across the bed and a wallet containing appellant's identification was located on the fireplace mantel. Some marijuana was found in the "center room."

Appellant argues that the "front bedroom" and the room with the fireplace are not one and the same. We disagree. Detective Corporal Harold L. Fremeau of the Montgomery County Police Department testified relative to the results of the search of the apartment:

[Assistant State's Attorney]

> "A. It is . . . taken from the front bedroom, with the fireplace which contained the identification of [appellant].
>
> Q. Other than [these] items . . . what if anything did you find in that bedroom, that front bedroom that had contained [appellant's] identification?
>
> A. We found a wallet containing the identification of [appellant] and $20.00 U.S. currency and a letter from a jacket pocket which was laying on the bed, which was addressed to [appellant]."

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[2] Md. Ann. Code art. 27, § 277(o) defines "Marihuana" (also spelled "marijuana") as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, ..." "Hashish" is "purified extract prepared from the dried flowers of the hemp plant [Cannabis sativa] . . . ." *American Heritage Dictionary of the English Language.* Hashish is a derivative of marijuana and is a controlled dangerous substance within the ambit of Md. Ann. Code art. 27, § 276 *et seq.*

Appellant argues that the evidence did not show that he had the exclusive possession of the entire apartment, and there is no evidence showing which, if any, of the bedrooms belonged to him except for the presence of the appellant's wallet containing his identification and the jacket containing the letter. Appellant asserts that even if one construes these to be sufficient evidence to infer that the room was in fact that of the appellant, it was not demonstrated that the appellant was in the room at the time of the search, and, consequently, the appellant was not "clearly" in exclusive control even of that room. We think appellant's reasoning to be specious. In *Davis and Green* v. *State,* 9 Md. App. 48 (1970), we said, at 52-53:

> "It has been held that where one has exclusive possession of a home or apartment in which prohibitive narcotics are found, it may be inferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them; but where the accused has not been in such exclusive possession, it may not be inferred that he knew of the presence of the narcotics and had control of them, *unless other incriminating circumstances are shown which tend to buttress such an inference* . . . The Supreme Court of California pointed out in *People* v. *Redrick,* 359 P.2d 255, that no sharp line can be drawn to distinguish the congeries of facts which will, and those which will not, constitute legally sufficient evidence that a person had control of a narcotic found in a place to which he had access, but not exclusive access, and over which he had some control but not exclusive control." (Emphasis supplied).

In the instant case those incriminating circumstances include the fact that in the bedroom in which the jacket containing the letter addressed to appellant was found, there was also "one package of cigarette papers, one package of . . . plastic baggies, containing a green substance, and two books of matches." The substance was identified as hashish. In the same room on top of the fireplace mantel

was one package of Marvel cigarette papers, a gold cigarette case containing a marijuana roach, a piece of filter screen, and a wallet with identification indicating it belonged to the appellant.

We conclude that the jury, as the trier of fact, could justifiably conclude that the appellant knew of the presence of the controlled substances in the apartment and had control of them. Such an inference is buttressed by the "other incriminating circumstances" which were shown.

III

Appellant's third argument is devoid of merit. He contends that he was not allowed to ask certain *voir dire* questions of the jury. While it is admitted that the trial court did question the jury on *voir dire*, we are unable to evaluate those questions because the *voir dire* was not recorded. The record is silent as to what questions were actually asked of the jury and their responses thereto. Appellant contends that the series of questions which he submitted to us were not asked by the trial court. This may be so but we are unable to say that the questions were asked by the trial court did not touch upon or embrace the specific questions of the appellant. We cannot decide the issue on the basis of the record before us. There is nothing for us to review. *See Gibson, Tate and Austin* v. *State,* 17 Md. App. —— (1973) [Nos. 413, 464, 629, Sept. Term, 1972, decided Feb. 28, 1973].

IV

Appellant next contends that the trial judge improperly interfered with and changed the jury's verdict at the suggestion of the Assistant State's Attorney. We disagree. The entire proceeding reads as follows:

> "THE FORELADY: We find the defendant, Bruce Charles Burger, sane at the time of the commission of the crime.

THE CLERK: What say you, is he guilty of the matter whereof he stands indicted under Count Number One or not guilty?

THE FORELADY: Guilty on Count One.

THE CLERK: Is he guilty of the matter whereof he stands indicted under County Number Four or not guilty?

THE FORELADY: He is guilty on Count Number Four.

THE CLERK: Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded.

THE FORELADY: I have one more thing to say. We were permitted to request leniency and continued rehabilitation. We only make these guilty verdicts with the request for leniency and continued rehabilitation.

THE COURT: You have a right to recommend mercy.

[ASSISTANT STATE'S ATTORNEY]

May we approach the bench, Your Honor?
Bench Conference reported as follows:

[ASSISTANT STATE'S ATTORNEY]

If Your Honor please,—

THE COURT: I didn't hear all of what she said.

[ASSISTANT STATE'S ATTORNEY]

She requested leniency and continued rehabilitation. The Rule doesn't contemplate that kind of limitation, but we don't have any argument with the form of the verdict.

[DEFENSE COUNSEL]

My problem, Your Honor, is that I think that we have here a jury, after approximately one hour and 50 minutes, coming to a compromise where they are going to find the boy sane, if we keep him under the care of the same rehabilitative forces, going to school and the psychiatrist.

I know there have been capital cases where the jury has been reinstructed that they can come back with leniency or mercy in the case.

THE COURT: The Court construes the request in substance as a recommendation of mercy. The other words outside of it recommending mercy the Court will just consider as surplus, but in substance it is a recommendation of mercy and the jury has a right to do that.

[ASSISTANT STATE'S ATTORNEY]

We submit that that is true, Your Honor.

THE COURT: So I think the verdict can be taken and recorded. Do you wish to poll the jury?

[DEFENSE COUNSEL]

I think I would, yes.

[ASSISTANT STATE'S ATTORNEY]

Perhaps Your Honor would want to inquire of the jury if their verdict is guilty on those two counts with a recommendation for mercy.

THE COURT: Did they report that?

[ASSISTANT STATE'S ATTORNEY]

She did, but she, of course added the words recommend leniency and continued rehabilitation. I think that a proper term would be guilty under the two counts of the indictment, with a recommendation of mercy.

THE COURT: Very well.

(Whereupon, the hearing resumed in open court).

THE COURT: Poll the jury. Just ask whether the forelady's verdict is their verdict.

(Whereupon, the Clerk asked of each juror whether the forelady's verdict was their verdict and all answered, yes.)

Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded. Your forelady saith that Bruce Charles Burger, prisoner at the bar, is sane, that he is guilty as charged under Count Number One, that he is guilty as charged under Count Number Four of the indictment, and so you all say?

THE JURY: Yes."

We think it clear that the jury's verdict as finally enrolled was that the appellant was found sane and guilty of counts 1 and 4. We cannot share appellant's view that the verdict was qualified to such an extent that it was illegal. The recommendation of "leniency and continued rehabilitation" is surplusage.

V

Penultimately, appellant argues that the State failed to show that the appellant was sane at the time of the alleged offense. Our perusal of the testimony discloses that Drs. Sauer and Mackay both related to the jury that in their (the doctors') individual opinions the appellant was sane within the meaning of Md. Ann. Code art. 59, § 25(a); that while the appellant may have suffered from a drug related "mental disorder" he did not lack "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Dr. Murphy, a privately retained psychiatrist testifying for the appellant, found, on the other hand, that the appellant was insane at the time of the commissions of the crimes and was unable to conform his conduct to the requirements of law. Basically, the appellant argues that the doctors who testified for the State did not examine the appellant until some time after Dr. Murphy had been treating the appellant. Appellant says it is impossible for the State's doctors to know the appellant's mental condition at the time of the commission of the crimes. He reasons that they only saw him following the successful treatments by Dr. Murphy. The

State's doctors felt, however, that they could give an opinion to a reasonable degree of medical certainty. This issue presented a question of fact for the jury and not for this Court. We do not weigh evidence nor judge the credibility of witnesses. If, as happened here, the jury believed the State's doctors and not Dr. Murphy, such belief on the part of the jury is no ground for reversal. They are entitled to accept and weigh any witness. We find appellant's contention to be devoid of merit.

VI

Ultimately, appellant, in a recapitulation of all his preceding arguments, contends that when those arguments are lumped into one "ball of wax" they indicate that the appellant did not receive a fair and impartial trial. We disagree. We have found appellant's first five contentions to be lacking in merit. The sixth argument grounded on the other five must fail of its own weight.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

APPENDIX B

United States Constitutional Provisions Involved

[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

[AMENDMENT VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

[AMENDMENT] XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.